APP – A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of February, two thousand eighteen.

Yan Ping Xu,

Plaintiff - Appellant,

v.

The City of New York, other The New York City Department of Health and Mental Hygiene, Dr. Jane R Zucker, Dennis J. King, Brenda M. McIntyre,

Defendants - Appellees.

ORDER

Docket No: 16 - 4079

Appellant, Yan Ping Xu, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APP – B

YAN PING XU, Plaintiff-Appellant,

v.

THE CITY OF NEW YORK, s/h/a THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, DR. JANE R. ZUCKER, DENNIS J. KING, BRENDA M. MCINTYRE, Defendants-Appellees.

No. 16-4079.

United States Court of Appeals
Second Circuit

November 2, 2017.

Appeal from the District Court of the Southern District of New York (Torres, *J.*).

Yan Ping Xu, pro se, Bay Shore, N.Y., for Plaintiff-Appellant.

Janet L. Zaleon, Assistant Corporation Counsel, (Claude S. Platton, Assistant Corporation Counsel, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, N.Y., for Defendants-Appellees, City of New York, s/h/a The New York City Department of Health and Mental Hygiene, and Brenda M. McIntyre.

Jessica Jean Hu, Assistant United States Attorney, (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), *for* Joon H. Kim, Acting United States Attorney for the Southern District of

New York, New York, N.Y., for Defendants-Appellees, Dr. Jane R. Zucker and Dennis J. King.

Present: JOHN M. WALKER, JR., ROSEMARY S. POOLER, RAYMOND J. LOHIER, JR., *Circuit Judges.*

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

Appellant Yan Ping Xu appeals the judgment entered on September 28, 2016 in the United States District Court for the Southern District of New York (Torres, *J.*), granting judgment on the pleadings to Defendants-Appellees City of New York s/h/a The

New York City Department of Health and Mental Hygiene ("DHMH") and Brenda M. McIntyre (collectively, "Municipal Defendants"), and Jane R. Zucker and Dennis J. King (collectively, "Federal Defendants"), on Xu's claims for violations of procedural due process; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"); Section 1981 of the Civil Rights Act of 1871, 42 U.S.C. § 1981 ("Section 1981"); Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 ("Section 1983"); Section 1985(3) of the Civil Rights Act of 1871, 42 U.S.C. § 1985 ("Section 1985"); the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). The district court construed Xu's procedural due process claims against Federal Defendants in their official capacity as barred by sovereign immunity, and the claims against Federal Defendants in their individual capacity as a *Bivens* action. *See* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review de novo the district court's entry of judgment on the pleadings under Rule 12(c), accepting as true all factual allegations in the complaint and drawing all reasonable inferences for the plaintiff. *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). To survive a motion for judgment on

the pleadings, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). We "liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they suggest." *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (quoting *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007)).

We vacate and remand as to Xu's procedural due process claim against Municipal Defendants. Assuming without deciding that Xu possessed a property interest in her position, Xu has stated a plausible claim that her procedural due process rights were violated by Municipal Defendants. Though it is well settled that a postdeprivation hearing may satisfy due process when the claim is "based on random, unauthorized acts by state employees," *Hellenic American Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996) ("*HANAC*"), a postdeprivation remedy may not suffice when the alleged violation was perpetrated by "officials with final authority over significant matters, which contravene the requirements of a written municipal code, [and] can constitute established state procedure," *Burtnieks v. City of New York*, 716 F.2d 982, 988 (2d Cir. 1983). We have reasoned that "categorizing acts of high-level officials as `random and unauthorized' makes little sense because the state acts through its high-

level officials." *DiBlasio v. Novello*, 344 F.3d 292, 302-03 (2d Cir. 2003) (citation omitted).

We believe Xu has alleged sufficient facts to state a facially plausible claim that her firing was the result of decisions made by "officials with final authority over significant matters," *Burtnieks*, 716 F.2d at 988, who may properly be considered "high-level officials" for the purposes of that exception, *DiBlasio*, 344 F.3d at 302. Xu was improperly fired without a predeprivation hearing because Municipal Defendants wrongly believed her to be a probationary employee who was not entitled to such a hearing. Xu alleges that her firing was approved by Brenda McIntyre, who was the Assistant Commissioner and Director of the Bureau of Human Resources for the Department of Mental Health and Hygiene. At this early stage of the litigation, these allegations are sufficient to state a facially plausible claim that the "high-level official" exception should apply to this case.

We also vacate and remand with regard to Xu's allegation against Municipal Defendants that her termination was due to impermissible discrimination in violation of Title VII. "To state a prima facie case of discriminatory discharge under Title VII, a plaintiff must allege that: (1) [s]he falls within a protected group; (2) [s]he held a position for which [s]he was qualified; (3) [s]he was discharged; and (4) `the discharge occurred after circumstances giving rise to an inference of discrimination.' A plaintiff

may demonstrate circumstances giving rise to an inference of discrimination by alleging that [s]he was treated less favorably than similarly situated employees of other races or national origins." *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 229 (2d Cir. 2014) (citations omitted).

Xu alleged that Michael Hansen, a younger white male, was a similarly situated employee treated more favorably by her supervisors on the basis of race. Xu alleged that she and Hansen were both classified as "City Research Scientist I" and were therefore employed at the same occupational level. Xu also alleged that she trained Hansen on some aspects of programming, took over some of his responsibilities, and performed work that was both higher-level and higher-quality than the work performed by Hansen. She further alleges that she received negative feedback from Zucker and King while Hansen received positive feedback, and that Hansen was improperly tasked with supervising her. These allegations of disparate treatment from a similarly situated colleague are sufficient to establish a prima facie case for discriminatory termination in violation of Title VII. For the same reason, we are compelled to vacate the dismissal of Xu's claims under the NYSHRL and the NYCHRL, and remand for further proceedings, as those claims rest on the same allegations of disparate treatment.

We have reviewed the remainder of Xu's claims and have found them to be without merit.

Accordingly, the order of the district court hereby is AFFIRMED in all respects other than as to Xu's procedural due process claim against Municipal Defendants and as to Xu's Title VII, NYSHRL, and NYCHRL claims on the basis of disparate treatment. The judgment as to those claims is VACATED and REMANDED for further proceedings consistent with this order.

APP - C

YAN PING XU, Plaintiff,

v.

The CITY OF NEW YORK s/h/a The New York City Department of Health and Mental Hygiene, Dr. Jane R. Zucker, Dennis J. King, Brenda M. McIntyre, Defendants.

08 Civ. 11339 (AT)

Signed 09/27/2016

Attorneys and Law Firms

Yan Ping Xu, Bay Shore, NY, pro se.

Danielle Barrett, NYC Law Department, Office of the Corporation Counsel, Kurt Brian Rose, Pinar Ozgu, Benjamin Welikson, New York City Law Department, Stephen Paul Pischl, Clifton Budd & DeMaria, LLP, Steven Adam Sutro, Office of the Corporation Counsel, L&E Division, Jessica Jean Hu, United States Attorney's Office, Bertrand Rolf Madsen, Madsen Law P.C., New York, NY, for Defendants.

Opinion

ORDER

ANALISA TORRES, United States District Judge

*1 Plaintiff *pro se*, Yan Ping Xu, alleges employment discrimination and violation of her constitutional rights by the City of New York (the "City") s/h/a the New York City Department of Health & Mental Hygiene (the "DOHMH"), and Brenda M. McIntyre ("McIntyre," and collectively, the "Municipal Defendants") and by Jane R. Zucker ("Zucker") and

Dennis J. King ("King," and together, the "Federal Defendants").

The Federal Defendants and the Municipal Defendants move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). For the following reasons, the motions are GRANTED.

BACKGROUND

In a Memorandum and Order dated February 20, 2014, the Court granted the Federal and Municipal Defendants' motion for judgment on the pleadings. ECF No. 122. Xu appealed, and the Second Circuit affirmed in part and reversed in part the dismissal. *Yan Ping Xu v. City of New York*, 612 Fed.Appx. 22, 23 (2d Cir. 2015) (summary order). The Second Circuit affirmed the dismissal of the discrimination and retaliation claims against the Federal Defendants. The Second Circuit further affirmed the dismissal of the Section 75-b claim, the First Amendment Retaliation claim, and the Collective Bargaining Law claim against both the Federal and Municipal Defendants. The Second Circuit reversed the dismissal of the claims that this Court found barred by the preclusion doctrines.

The Second Circuit revived the due process claim, brought pursuant to 42 U.S.C. § 1983 against the Municipal Defendants and Federal Defendants, and pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* against the Federal Defendants in their individual capacities. *See* 403 U.S. 388 (1971). The Second Circuit also revived Xu's discrimination and equal protection claims against the Municipal Defendants pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200E *et seq.*

("Title VII"); 42 U.S.C. §§ 1981, 1983, 1985(3); the New York State Human Rights Law, New York Executive Law §§ 290 et seq. ("NYSHRL"); and the New York City Human Rights Law, New York Administrative Code §§ 8-101 *et seq.* ("NYCHRL").

Defendants move for judgment on the pleadings, which is Xu's third amended complaint ("Compl."). The Court shall not repeat the facts here, as they are set forth in detail in the Court's February 20, 2014 Memorandum and Order. ECF No. 112.

DISCUSSION

I. Standard of Review

A Rule 12(c) motion for failure to state a claim relies on the same standard as that applicable to a Rule 12(b)(6) motion to dismiss. *See Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994) (citing *Ad—Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch Coll.*, 835 F.2d 980, 982 (2d Cir. 1987). To withstand a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff is not required to provide "detailed factual allegations" in the complaint, but must assert "more than labels and conclusions." *Twombly*, 550 U.S. at 555. Ultimately, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* The court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the non-movant. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

*2 "A Rule 12(c) motion for judgment on the pleadings based upon a lack of subject matter jurisdiction is treated as a Rule 12(b)(1) motion to dismiss the complaint." *Peters v. Timespan Communications, Inc.*, No. 97 Civ. 8750, 1999 WL 135231, at *3 (S.D.N.Y. March 12, 1999). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Reserve Solutions Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 286 (S.D.N.Y. 2006). Under Rule 12(b)(1), "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.*

A court will "liberally construe pleadings and briefs submitted by *pro se* litigants, reading such submissions 'to raise the strongest arguments they suggest.' " *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (citing *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (additional citations omitted)).

II. Analysis

A. Due Process

1. Municipal Defendants

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*"[1] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original). For the purpose of this motion, the Court assumes without deciding that Xu had a constitutionally protected property interest in

her continued employment. At issue is whether Xu was afforded due process of law through the availability of an Article 78 hearing, of which Xu availed herself, *see* Compl. ¶ 111, or if Defendants were required to provide her with a pre-termination hearing.

The Supreme Court has held that due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The Court has also held, however, that due process does not require the impossible. *See Zinermon*, 494 U.S. at 128-9; *DiBLasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003). Thus, the Second Circuit has consistently modified the pre-deprivation hearing requirement "[w]here a deprivation at the hands of a government actor is 'random and unauthorized,' hence rendering it impossible for the government to provide a pre-deprivation hearing." *DiBLasio*, 344 F.3d at 302. In these circumstances, "the state satisfies procedural due process requirements so long as it provides a meaningful post-deprivation remedy." *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006) . In contrast, "[w]hen the deprivation occurs in the more structured environment of established state procedures, rather than random acts, the availability of postdeprivation procedures will not, ipso facto, satisfy due process." *Hellenic Am. Neighborhood Action Comm.*, 101 F.3d 877, 880 (2d. Cir. 1996). Although "the distinction between random and unauthorized conduct and established state procedures ... is not clear-cut," *Rivera-Powell*, 470 F.3d at 465, "[t]he controlling inquiry is solely

whether the state is in a position to provide for predeprivation process," *Hellenic Am. Neighborhood Action Comm.*, 101 F.3d at 880.

*3 Xu does not argue that she was terminated pursuant to established procedures or government policy. Rather, she contends that Defendants failed to comply with the existing procedural requirements for her termination. Compl. ¶¶ 25, 74-99. Accordingly, the Court construes Xu's firing as occurring pursuant to "random and unauthorized" government activity. *See Henry v. City of New York*, 638 Fed.Appx. 113, 115-16 (2d Cir. 2016) (summary order) (finding "random or unauthorized act by state employee" when plaintiff pleaded that "defendants did not comply with the prescribed procedure[s] [for termination]" and "[p]laintiffs [offered] only conclusory allegations regarding the existence of an unofficial policy under which state officials regularly disregarded procedural requirements for terminations").

When the due process claim is based on a random, unauthorized act, an Article 78 proceeding is an adequate post-deprivation remedy that satisfies the requirements of due process. *See Hellenic Am. Neighborhood Action Comm.*, 101 F.3d at 880-81; *see also Henry*, 638 Fed.Appx. at 116 ("[A]n Article 78 proceeding was available to plaintiffs, which is sufficient to satisfy the Due Process Clause."). Xu had an Article 78 hearing. Compl. ¶ 111. Accordingly, Xu received all of the process she was due. The Court has considered Xu's additional due process arguments and finds them without merit. Additionally, because there is no underlying constitutional violation, there can be no municipal

liability pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *See Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006).

Accordingly, the Municipal Defendants' motion for judgement on the pleadings with respect to the due process claim is GRANTED.

2. Federal Defendants

The Court construes Xu's claims against the Federal Defendants as claims against them in their official and individual capacities. Xu's claims against the Federal Defendants in their individual capacities must be dismissed for lack of subject matter jurisdiction. "Under the doctrine of sovereign immunity, an action for damages will not lie against the United States absent consent." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994). "Because an action against a federal agency or federal officers in their official capacities is essentially a suit against the United States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived." *Id.* There is no waiver of sovereign immunity in this case, and Xu has not met her burden of proving by a preponderance of the evidence that subject matter jurisdiction exists. *See Makarova*, 201 F.3d at 113.

Accordingly, the Federal Defendants' motion is GRANTED as to the Federal Defendants in their official capacity.

The Court construes Xu's due process claim against the Federal Defendants in their individual capacity as a *Bivens* action. *See Arar v. Ashcroft*, 585 F.3d 559, 597 (2d Cir. 2000) ("A deprivation of procedural due process rights can give rise to a *Bivens* claim.").

Xu's *Bivens* action against the Federal Defendants is similar to her claim against the Municipal Defendants; she argues that the Federal Defendants failed to comply with procedural requirements for her termination and did not provide her with a pre-termination hearing. Compl. ¶¶ 74-99. For the reasons already stated, Xu availed herself of the opportunity to have an Article 78 hearing and, therefore, received all of the process she was due. Because Xu's due process rights were not violated, her *Bivens* action for violation of due process cannot survive a judgement on the pleadings.

Accordingly, the Federal Defendants' motion for judgement on the pleadings is GRANTED.

B. Discrimination and Equal Protection Claims Against Municipal Defendants

1. Title VII, § 1981, § 1983, and the NYSHRL claims

*4 Xu's Title VII, § 1981, § 1983, and NYSHRL claims are analyzed under the same burden-shifting framework. *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010); *Demoret v. Zegarelli*, 451 F.3d 140, 151, 153 (2d Cir. 2006). Under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff must allege that "(1) she is a member of a protected class; (2) her job performance was satisfactory; (3) she suffered adverse employment action; and (4) the action occurred under conditions giving rise to an inference of discrimination." *Demoret*, 451 F.3d at 151. If a plaintiff can establish a *prima facie* case, the burden shifts to the defendant. *Id.*

"A showing of disparate treatment—that is, a showing that the employer treated plaintiff 'less favorably than a similarly situated employee outside his protected group'—is a recognized method of raising an inference of discrimination for purposes of making out a *prima facie* case." *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003) (quoting *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000)). "A plaintiff relying on disparate treatment evidence "must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself." *Id.* (quoting *Graham*, 230 F.3d at 39). The comparison employees, "must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination." *McGuinness v. Lincoln Hall*, 263 F.3d 49, 54 (2d Cir. 2001).

Xu, who describes herself as a "57-year old Asian woman of Chinese national origin," contends that she was discriminated against based on her race, gender, and age. Compl. ¶ 38. Xu bases her disparate treatment claim on allegations that she was treated less favorably than Michael Hansen, a colleague who was white, male, and younger than her and "who was at the same level as [she] was." *Id.* ¶¶ 38, 39. Xu claims that, among other things, Hansen was assigned to direct her daily tasks, was supported while she was criticized, and was about to be promoted around the time that she was fired. *Id.* ¶¶ 39, 40, 48, 65.

Despite Xu's claim that she and Hansen were at the "same level," Xu's pleadings do not suggest that she and Hansen are similarly situated. Compl. ¶¶ 38, 39.

Xu alleges that Hansen worked in the City Research Scientist role for the Vaccine for Children Program ("VCF") from December 2004 to December 2005. *Id.* ¶ 38. Xu started as a City Research Scientist in 2007 and "took over Hansen's position after he requested and received a reassignment away from the VFC." *Id.* ¶¶ 38, 41. Thus, Hansen had considerably more experience working for the DOHMH, and previously served in Xu's past role. "Employees are not 'similarly situated' merely because their [job responsibilities] might be analogized." *Simpson v. Metro-North Commuter R.R., No. 04 Civ. 2565,* 2006 WL 2056366, at *7 (S.D.N.Y. July 20, 2006) (quoting *Quarless v. Bronx-Lebanon Hosp. Ctr.,* 228 F. Supp. 2d 377, 383 (S.D.N.Y. 2002)). Rather, "[e]mployment characteristics which can support a finding that two employees are 'similarly situated' include 'similarities in education, seniority, performance, and specific work duties.' " *Potash v. Florida Union Free School Dist.*, 972 F. Supp. 2d 557, 580 (S.D.N.Y. 2013) (citation omitted). Given Xu's allegations, and particularly the difference in seniority, Xu has not alleged facts sufficient to "support at least a minimal inference that the difference of treatment may be attributable to discrimination." *McGuinness*, 263 F.3d at 54. As Xu has not set forth other facts sufficient to infer discrimination, *see* Compl. ¶¶ 38-65, her discrimination claims must be dismissed. Because there is no remaining claim for a constitutional violation, Xu's *Monell* claims against the city are dismissed as well. *See Segal*, 459 F.3d at 219.

*5 Accordingly, the Municipal Defendants' motion for judgement on the pleadings is GRANTED as to

the Title VII, § 1981, § 1983, and the NYSHRL claims.

2. NYCHRL claim

The NYCHRL prohibits a broader range of discriminatory and retaliatory conduct than its state and federal analogues, and must be analyzed separately. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). However, the NYCHRL is not a "general civility code" and "plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive." *Id.* at 110. For the reasons stated above, Xu has not pleaded facts sufficient to show discriminatory motive. Even under the NYCHRL's broader standard, Xu has not met her burden.

Accordingly the Municipal Defendants' motion for judgement on the pleadings is GRANTED as to the NYCHRL claim.

3. § 1985(3) claim

Xu also brings a cause of action under § 1985(3), which requires a "conspiracy [ ] motivated by racial animus." *Brown v. City of Oneonta*, 221 F.3d 329, 341 (2d Cir. 2000). Xu has not pleaded such a conspiracy.

Accordingly, the Municipal Defendants' motion for judgment on the pleadings is GRANTED as to the § 1985(3) claim.

CONCLUSION

For the reasons set forth above, the Federal and Municipal Defendants' motions for judgment on the pleadings is GRANTED.

The Clerk of Court is directed to mail a copy of this Order to Plaintiff *pro se.*

The Clerk of Court is further directed to close the case.

SO ORDERED.

Footnotes

1. The Court construes Xu's due process claim as a claim for violation of procedural due process. Plaintiff has not alleged a basis for a substantive due process claim, which protects against government action that is "so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999)

APP - D
CONSTITUTIONAL AND STATUTORY

The First Amendment: "Congress shall make no law .... abridging the freedom of speech, or of the press,..."

The Fifth Amendment: "No person shall be .... deprived of life, liberty, or property, without due process of law"

42 U.S.C. § 215. Detail of Service personnel

(b) State health or mental health authorities

Upon the request of any State health authority or, in the case of work relating to mental health, any State mental health authority, personnel of the Service may be detailed by the Surgeon General for the purpose of assisting such State or a political subdivision thereof in work related to the functions of the Service.

42 U.S.C. § 2000 e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer— .....because of such individual's race, color, religion, sex, or national origin; or

The New York Const. Art. I § 8 Freedom of speech and press;...

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.